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IN THE

Supreme Court of the United States

OCTOBER TERM 1942

No. 286

MAHOGANY ASSOCIATION, INC., and THOMPSON MAHOGANY COMPANY,

Petitioners,

v.

BLACK & YATES, INC., THOMAS E. POWE LUMBER COMPANY and WALTER G. SCRIM,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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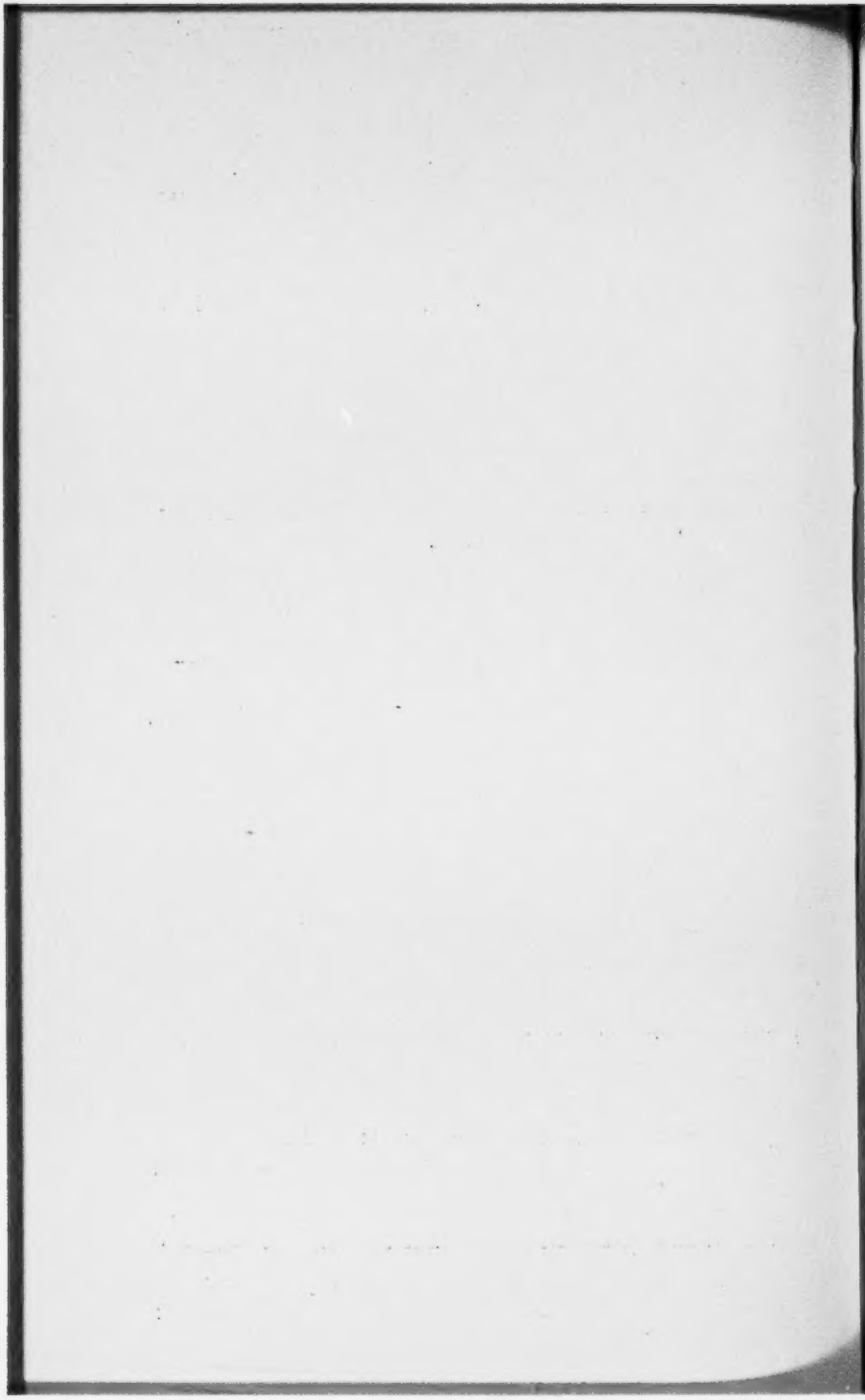

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Opinions Below

The case was twice argued before the Court below, the reargument having been before the Court en banc. The first opinion of the Circuit Court, filed June 30, 1941 (R. 54-62), and the opinion after reargument, filed June 10, 1942 (R. 75-85), are reported together at 129 Fed. (2d) 227. The opinion of the District Court filed August 1, 1940 (R. 32-45), is reported at 34 Fed. Supp. 450.

Jurisdiction

The date of the judgment of the Circuit Court of Appeals reversing the decree of the District Court is June 10, 1942 (R. 85-6). The petition for certiorari was filed in this Court on August 7, 1942. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended.

Questions Presented

The questions set out in the petition, page 8, we submit, are not concerned with the decision of the Court below but with obiter dictum. In any event, if the complaint states a cause of action for injunction against unfair competition under local law, there would seem to be no reason to grant the petition.

Statement

Plaintiffs are dealers in "Philippine mahogany" which has been widely sold in this country under that name for many years.[1]

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[1] In 1931, the Federal Trade Commission, in dismissing certain complaints in a second group of cases, approved the use of the term "Philippine mahogany", finding in effect that Philippine mahogany was a type of mahogany (15 F. T. C. Dec. 439, 443-4) and thereby reversing a prior decision in a first group of cases (10 F. T. C. Dec. 280, 300, 320; 11 F. T. C. Dec. 248, 271, 293, 314) which had been confirmed by the Courts. In 1932 the Commission and respondents were successful in securing a modification of the Court orders so that the term "Philippine mahogany" was thereafter used with the approval of the Commission and the Courts (58 Fed. [2d] 182, modifying 26 Fed. [2d] 340; C. C. H. Fed. Trade Regulation Service Ct. Dec. Supp. 1932-37, Sec. 7015, p. 5060, also Vol. II, 7th Edition, Sec. 1062, p. 3022). Subsequent to these decisions, defendants misrepresented the decisions by stating that it was unlawful and unfair competition to sell "Philippine mahogany" as such and threatened plaintiff's customers with suit by

Defendants are charged with interfering with plaintiffs' custom, subsequent to the year 1932, by misrepresenting the decisions of the Federal Trade Commission and the Courts, threatening plaintiffs' customers with suit and other acts of unfair competition.

(*Footnote* [1] *continued*)
reason of their sale of "Philippine mahogany" as such (Com. pars. 23-30, R. 7-9; B/P 18, R. 25-6). In 1939 the Commission reopened the second group of dismissed proceedings, which had not been before the Circuit Courts of Appeals (Com. par. 26, R. 8), and the reopened proceedings are still pending.

There is nothing in the complaint or the bills of particulars to support the impression which petitioners seek to create (Petition, p. 6) that the Commission's 1931 decision was based on secondary meaning or that the Commission reopened the proceedings in 1939 solely to determine whether the term "Philippine mahogany" had acquired a secondary meaning, or that the proceedings were reopened in 1939 in order to apply the secondary meaning rule announced in the *Algoma* case (291 U. S. 67). In fact, Commissioner McCulloch's dissenting opinion indicates that the Commission's decision was not based on secondary meaning but on the finding that Philippine mahogany was a type of mahogany (15 F. T. C. Dec. 439, 440) and this has always been plaintiffs' position (R. 71-4). The *Algoma* case (1934) announced no new rule of secondary meaning. The same secondary meaning rule which was applied in the *Algoma* case was also applied in the first "Philippine mahogany" case (*F. T. C.* v. *Indiana Quartered Oak Co.*, 26 Fed. [2d] 340, 342, C. C. A. [2] 1928, modified in 1932, 58 Fed. [2d] 182), where it was decided that the term "Philippine mahogany" had not acquired and could not acquire a secondary meaning.

But in reality, it is immaterial whether respondents' cause of action here depends on secondary meaning or otherwise, since defendants' threats and misrepresentations, with reference to the lawful use of the term "Philippine mahogany", were made during a period when it cannot be disputed the use of the name "Philippine mahogany" was lawful and proper and would not subject the plaintiffs' customers to suits or prosecution, which is the fact today.

The Decisions Below

The District Court dismissed the complaint (R. 32-45). The Circuit Court reversed, stating in its opinion, filed June 30, 1941: "The learned district judge seems to us to have been influenced by his solution of an issue that did not happen to be before him" (R. 54). Defendants petitioned for a rehearing on the ground, among others, that the opinion changed the common law of Delaware and therefore was contrary to *Erie R. Company* v. *Tompkins*, 304 U. S. 64 (R. 63-70). After reargument en banc, the Court in its opinion, filed June 10, 1942, stated in part (R. 75):

> "As to the question of whether or not the plaintiffs have set forth a cause of action sounding in unfair competition, we shall deal later in this opinion. In our original opinion we decided that in Delaware a cause of action for trade libel or disparagement of goods might be maintained without regard to the existence or non-existence of civil conspiracy or unfair competition. Having some doubt as to the correctness of our decision on this point, we ordered rehearing. We shall endeavor to dispose of all the issues which we deem pertinent to the case at bar but we shall devote the first part of this opinion to the question of whether a 'pure' trade libel, that is to say a trade libel without any element of unfair competition or civil conspiracy or other aid to equitable jurisdiction, may be enjoined."

Thus characterizing its discussion of "pure" trade libel as obiter dictum, the Court considered the "question" of whether a "pure" trade libel without any element of unfair competition may be enjoined. It referred to cases involving "pure" trade libel and various criticisms of such

cases by authorities.[2] It then stated its decision[3] that the Court was not required to depart from the accepted rule of law of these cases in deciding that the complaint alleged a valid cause of action for unfair competition apart from "pure" trade libel or disparagement. Judge Biggs, speaking for the Court, said (R. 83-4):

> "In the case at bar we are not required to depart from severely criticized precedent. The District Court found that there was no competition between the woods of the plaintiffs and those of the defendants and that therefore there could be no competition. We think that the learned District Judge took too narrow a view of this question and that actually the woods of the plaintiffs and those of the defendants are in competition. The issue of unfair competition was not clearly disposed of in our first opinion. We conclude now that the allegations of the complaint viewed in the light of Rule 8 of the Federal Rules of Civil Procedure are sufficient to support a charge of unfair competition committed pursuant to the joint acts of the defendants and others."

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[2] The Court below correctly concluded (R. 78) that "the substantive law of Delaware gives the person who has received legal injury a right of action for trade libel or disparagement of goods" and that the remedy should be in accord with the Federal Court rules. Since this conclusion is obiter dictum, as later pointed out, we believe it would serve no useful purpose here to discuss this proposition.

[3] The Circuit Court reversed the District Court and remanded the case to the District Court with permission to amend the complaint to correct a technical defect in the allegation of jurisdictional amount.

ARGUMENT

I

The petition is based primarily on an erroneous assumption of fact. It states (p. 4) that the courts below agree the case is one solely for disparagement of goods and that "the issue, therefore, is reduced to the legal sufficiency of the allegations of disparagement to sustain a cause of action in equity". It also states (p. 4) that respondents "rested solely on disparagement or trade libel". The brief in support of petition (p. 14) asserts: "The only cause of action pleaded in the instant case is that defendants injured plaintiffs by words which disparaged their goods and reflected upon their business ethics." These assertions in the brief and petition are incorrect. The complaint is not one solely for disparagement of goods. While some of the acts alleged constitute disparagement of goods, other acts of unfair competition are also alleged, such as threats of suits, misrepresentation of decisions, and conspiracy to interfere with defendants' business.

The questions presented by the petition (p. 8) are not directed to the Court's decision that the complaint alleges a cause of action for unfair competition but are directed to the conclusions reached by the Court below in connection with its discussion of "pure" trade libel or disparagement of goods. Thus, the questions presented are concerned with obiter dictum. The petition in effect asks the Court to review the decision below on the erroneous assumption that the complaint is limited to a cause of action for disparagement of goods, which cause of action petitioners claim cannot be enjoined under Delaware law. In reality the Court below decided that the complaint states a valid cause of action for unfair competition for acts apart from disparagement of goods.

The petition should be denied since it is not directed to the actual basis of the decision below.

II

The Court's decision that the complaint states a cause of action for unfair competition is based on and conforms to the local law. This is evident from the opinion and all "persuasive data" [4] bearing on the local law and "the entire body of substantive law".[5]

The complaint alleges acts of unfair competition other than acts of mere disparagement of goods. It alleges intimidation of respondents' customers by threats of suit or prosecution. It alleges (R. 7-8, Com. Par. 24) that defendants (petitioners)

> "have intimidated, coerced and deceived the customers of the plaintiffs and interfered with plaintiffs' relations with their customers and with other members of the trade and public by statements to the effect that to sell plaintiffs' wood or merchandise made therefrom as Philippine mahogany is unlawful and that it is an unfair method of competition and that it may subject the customers of plaintiffs and others dealing in plaintiffs' merchandise to civil liability or criminal prosecution."

The complaint also alleges (R. 7, Com. Par. 23) that defendants have made false statements interfering with plaintiffs' business. One of the false statements made by defendants was a misrepresentation of the courts' decisions. They stated that the Federal Trade Commission had ruled that the Philippine woods had no right to the designation "Philippine mahogany", that this ruling had been upheld by the courts and confirmed by the Supreme Court; while omitting to state at the same time that the Federal Trade Commission had subsequently reversed itself on the facts by permitting the use of the term "Philippine mahogany" (R. 26, B/P 18(t)).

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[4] *West* v. *A. T. & T. Co.*, 311 U. S. 223, 237.

[5] *Ruhlin* v. *N. Y. Life Ins. Co.*, 304 U. S. 202, 9.

No decision by the Delaware courts is cited by either party holding that injunction is not the proper remedy in an action for unfair competition in threatening and intimidating customers and in misrepresenting decisions even though the action is also based on disparagement of goods. Obiter dictum, however, in every relevant decision of the Delaware court and of the Federal Court in Delaware makes it clear that an injunction in the present case is the proper remedy under the Delaware law.

In support of their petition the only Delaware case cited by petitioners is the Federal Court case of *Edison* v. *Thomas A. Edison, Jr. Chemical Company,* 128 Fed. 957, decided by Judge Bradford in 1904.[6] This case, however, was considered to be a "mere libel" case and the Court intimated that had the libel been accompanied by threats, intimidation or coercion, an injunction would have been the proper relief. Judge Bradford said (p. 963):

> "The case now in hand, being one merely of libel or defamation of business reputation, unaccompanied by threats, intimidation or coercion, or by any direct attack upon property or conduct of business, or by any direct or indirect creation of liability on the part of the complainant, is not within the equitable jurisdiction of this court. While the decisions are somewhat inharmonious, I am satisfied by an overwhelming weight of authority that this court has no jurisdiction to enjoin the publication of a mere libel or slander, and, consequently, no authority to grant the relief prayed."

In *Motion Picture Projectionists' Union* v. *Rialto Theatre,* 17 Atl. (2d) 836 (Sup. Ct. Del., 1941), plaintiff theatre owner sued to enjoin the defendant union from picketing plaintiff's premises. The Court discussed the conditions

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[6] The Court below discussed (R. 79-80) the *Edison* case, concluding that it and other Delaware cases determined that the provisions of Section 5 of Article 1 of the Constitution of Delaware having to do with the free press were inapplicable to trade libels as distinguished from personal defamations.

which warranted the issuance of an injunction against picketing and held that the facts in the case in question did not warrant a continuance of an injunction. However, Chief Justice Layton said (p. 841):

> "Dependent upon the existence of a lawful strike resulting from a bona fide labor dispute over wages, hours or conditions of work, picketing as a means of informing workers or the public of the existence of such dispute and for inspiring their support, is lawful *if conducted without threats, violence, molestation or the circulation of false or misleading representations by a reasonable number of persons whose interest in the controversy is not too removed.*" (Italics ours.)

The obiter dictum in this case is that picketing, if conducted with "threats, violence, molestation or the circulation of false or misleading representations", would be enjoined. Defendants seek to distinguish this case on the ground that it is a labor case, but it is not distinguishable from the present case in principle. Picketing is lawful if conducted without intimidation or coercion. In the present case competition is lawful if conducted without intimidation or coercion. In either case the unlawful act warranting injunctive relief is the intimidation or coercion.[7]

In *B. F. Goodrich, et al.* v. *American Lakes Paper Co.*, 23 Fed. Supp. 682, 686 (D. C. Del., 1938), in determining a motion to dismiss the complaint on grounds, the first of which was failure to state a cause of action based upon unfair competition, and in which the defendants were charged with harassing or threatening plaintiffs' customers because of alleged infringement of a patent which had been held invalid by a Wisconsin Federal Court, the Delaware Federal Court said (p. 686):

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[7] The principles of law under which secondary boycotts are found to be illegal have been held to be analogous to the principle of law in a suit for an injunction to prevent interference with business. *American Mercury, Inc.* v. *Chase*, 13 Fed. (2d) 224, 225 (D. C., D. Mass., 1926).

"There remains for consideration the motion of American Lakes to dismiss the bill of complaint. The motion is based upon two grounds: (1) That no cause of action based upon unfair competition is alleged, and (2) that no cause of action under the Declaratory Judgment Statute is alleged against Goodrich.

"The first ground is definitely settled by Kessler v. Eldred, supra.[8] There the court said: 'Leaving entirely out of view any rights which Kessler's customers have or may have, it is Kessler's right that those customers should, in respect of the articles before the court in the previous judgment, be let alone by Eldred, and it is Eldred's duty to let them alone. * * * An action at law would be entirely inadequate to protect fully Kessler's unquestioned right, and, under these circumstances, though there may be no exact precedent, we think that the jurisdiction in equity exists.' "

The Federal Courts in Delaware have also indicated that an action will lie under the Delaware law to enjoin misrepresentation and misuse of court decisions.

In *General Talking Pictures Corporation, et al.* v. *Stanley Co. of America,* 42 Fed. (2d) 904-905 (D. C. Del., 1930), Judge Avis said:

"The power of the court to protect decrees of this character from being misrepresented to the public, and particularly to parties who may be customers of the competitive litigants, has been frequently recognized, and is not seriously denied by counsel for the plaintiffs.

"Sufficient authority is shown in the cases of Rollman Mfg. Co. v. Universal Hardware Works (C. C. A. 3, 238 F. 568, and DuPont v. DuPont (D. C. Del.), 251 F. 937."

In *DuPont* v. *DuPont,* 251 Fed. 937, 945 (D. C. Del., 1918), Judge Thompson, in an action concerned with the purchase of certain stock of the DuPont Company, declared

[8] 206 U. S. 285, 289-290.

that the Court could prevent the improper use of the opinion and decree of the Court under the ruling of *Rollman Mfg. Co.* v. *Universal Hardware Works,* 238 Fed. 568.

In *Gibson* v. *Smoot Engineering Corporation,* 50 Fed. (2d) 203, 204 (D. C. Del., 1931), Judge Nields stated:

> "Should it appear that, under pretense of giving notice of patent rights, a patentee, or one claiming under him, is pursuing a course which is calculated to injure unnecessarily a competitor's business and with the plain intention of so doing, his conduct will be deemed malicious. Such a patentee brings himself within the rule of law obtaining in cases of unfair competition in trade, and is subject to injunction. Racine Paper Goods Co. v. Dittgen (C. C. A.), 171 F. 631."

See also *DeForest Radio, Telephone & Telegraph Co.* v. *Radio Corporation of America,* 4 Fed. (2d) 134 (D. C. Del., 1925).

Delaware Courts in their decisions have repeatedly followed the practice, in cases where the rule of law has not been clearly announced in previous Delaware decisions, of reviewing the decisions in other States and giving great weight to such decisions.[9] In so doing the Delaware Courts were applying "the entire body of substantive law" [10]

The rule of law that intimidation and coercion may be enjoined is recognized in the courts of other States.[11] There

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[9] *Lynch* v. *Hill,* 6 Atl. (2d) 614 (Del. Ch., 1939); *Sellers, Rec'r* v. *McCormick et al.,* 19 Del. Ch. 238 (1933); *American Radio Stores, Inc.* v. *American Radio & Television Stores Corp.,* 17 Del. Ch. 127 (1930); *Wilmington Trust Co.* v. *Hendrickson,* 31 Del. 303 (1921).

[10] *Ruhlin* v. *N. Y. Life Ins. Co.,* 304 U. S. 202, 9.

[11] *Emack* v. *Kane,* 34 Fed. 46 (D. Ill., 1888); *A. B. Farquhar Co.* v. *National Harrow Co.,* 102 Fed. 714 (C. C. A. 3, 1900); *Beck* v. *Railway Teamsters' Union,* 118 Mich. 497; *Citizens Light, Heat & Power Co.* v. *Montgomery Light & Power Co.,* 171 Fed. 553 (C. C., Ala.); *Racine Paper Goods Co.* v. *Dittgen,* 171 Fed. 631 (C. C. A. 7, 1909); *Dehydro,*

has been virtually no divergence of opinion or change of view on the part of the Courts as regards the right to an injunction for intimidation or coercion. In this respect the situation does not involve any question as to which of two rules should be adopted or any question as to whether the law in Delaware or elsewhere is now different from what it may have been at some former time as in the case of mere libel or disparagement. The only case we find which denies injunctive relief in a case of intimidation or coercion where the acts also constitute libel or disparagement is the Missouri case of *Flint* v. *Hutchinson Smoke Burner Co.*, 110 Mo. 492. But this single exception to the universal rule can hardly be regarded as a datum having any persuasive effect whatever as to the law of Delaware.

We submit, therefore, that not only is there nothing in the way of data regarding Delaware law that prevents a court of equity from granting an injunction against interference with business relations by threats, intimidation or coercion but that all the available persuasive data and the entire body of substantive law indicate that such is the rule of Delaware. And having jurisdiction to enjoin those acts of the defendants constituting threats, intimidation or coercion the Court may also, in order to give complete relief, enjoin the other statements by the defendants made as a part of the same course of conduct although such statements if taken alone might amount merely to libel or disparagement.

On this view of the case it is on all fours with the Delaware Chancellor's decision in *Liberty Life Assurance Society* v. *The Heralds of Liberty of Delaware*, 15 Del. Ch. 369 (1927), 138 Atl. 634. There, the Court had jurisdiction over

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(*Footnote* [11] *continued*)
Inc. v. *Tetrolite Co.*, 53 Fed. Supp. 273 (D. C.., Okla., 1931); *Maytag* v. *Meadows*, 35 Fed. (2d) 403, 408 (C. C. A. 7, 1929); *Old Investors and Traders Corp.* v. *Jenkins*, 133 (N. Y.) Misc. 213 (1928), aff'd without opinion 225 App. Div. 860; *Davis* v. *New England Ry. Pub. Co.*, 203 Mass. 470.

the cause of action for unfair competition in infringing the plaintiff's trade name, and, having jurisdiction on that basis, disposed of the entire controversy, including the restraint of defendant from distributing letters containing disparaging statements injurious to plaintiff's business. Here, the Court having jurisdiction to enjoin intimidation, coercion and misrepresentation of decisions can also enjoin disparaging statements injurious to business. See also *Eastern States Petroleum Co.* v. *Universal Oil Products Company*, 22 Del. Ch. 333, 343-4, 2 Atl. (2d) 138 (1938).

Since the Court's decision conforms to the local law, the petition should be denied.

CONCLUSION

The Circuit Court of Appeals decided the case correctly and the petitioner has failed to suggest any adequate reason for the interposition of this Court. The petition for certiorari should be denied.

September 24, 1942.

Respectfully submitted,

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